No. 09-1291

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR REHEARING

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PETITION FOR REHEARING

I, petitioner, Andra Capaci, Pro se, respectfully move this court to:

1. Vacate it's order of June 21st, 2010, which denied my petition for a Writ of Certiorari filed by myself.
2. Grant the petition for Writ of Certiorari.

The grounds for rehearing are stated below:

1. The State of Alabama rules must comply with the Federal Constitutional rights of Due Process under the 14th Amendment.
2. The State of Alabama is depriving me, a Louisiana Citizen, of what is mine under this law by denying me my day in court.
3. It is a critical point to say that had my case been presented to the jury and not dismissed with prejudice prior to the jury actually hearing the merits of the case, the results would have been different.
4. The trial judge and the appellate court were at odds confirming the need for this court to grant Certiorari.

I beg for the provisions of the 14th Amendment to be enforced.

SUMMARY OF CASE

For 7 years I have been involved in this lawsuit.

I was a tenant in a shopping center for 9 years and my space developed serious health threatening mold. Instead of helping me, my landlord listened to their attorney who maliciously sued me for causing the mold. I counter sued as I had much to lose (about $500,000-$700,000). Their experts and my experts said the mold was caused by lack of maintenance.

My liability insurance carrier paid them $37,500 to settle which they did. However, I had lost all 7 offices full of furniture, conference room, reception area, etc . . . , a tremendous loss to me, including all of my intellectual material, customer files, and personal belongings. I was also under the care of a mold physician. All of my property was carelessly thrown into a trailer, now contaminated by the mold, which was later sold by Folmar.

I walked away losing all and now Folmar's insurance company wants $25,503.78 from me which is more than a hardship at this time. They want this money by October 7th, 2010.

For the 5 years since Hurricane Katrina, I have been a care taker for my parents, 96 years old and 94 years old. Their home flooded and they lost everything and moved in with me. On the day my Writ of Certiorari was denied, my father died. He was a Captain with the State Police for 34 years. My mother, 96 years old is still living with me. My parents were

married 74 years. My father taught me to "Never Quit." I know he would have wanted me to go on and petition for a re-hearing.

I know I need a miracle with this case, because it sure has been a tough 7 years. I have had a lot of legal expenses. Folmar literally really took its toll on me and they should be punished. I pray that whomever reads this can see it for what it really is.

The court should grant re-hearing in light of the 14th Amendment and its guarantee to protect me with fair trial procedures, due process, and equal protection of the law.

Respectively submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

ANDRA CAPACI

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App. 1

IN THE SUPREME COURT OF ALABAMA
1070824

Ex parte Folmar Kenner, LLC

(In re Andra Capaci d/b/a Andra Capaci Real Estate
v.
Folmar Kenner, LLC)

Appeal from Mobile Circuit Court
CV-04-2311

RESPONDENT CAPACI'S APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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APPLICATION FOR REHEARING

COMES now the Respondent Andra Capaci, d/b/a Andra Capaci Real Estate, and, pursuant to Rule 40, *ARAP*, files this application for a rehearing on the Court's opinion in this cause issued on September 18, 2009. As and for grounds for said rehearing, Respondent would show this Honorable Court as follows:

1. This Court has concluded that the Court of Civil Appeals substituted its own judgment for that of

the trial court, in concluding that Ms. Capaci's conduct was not willful or contumacious, in contravention of "the well-established principle that the trial court is far better situated than is an appellate court to determine whether Capaci's conduct was willful or contumacious because the trial court has the advantage of personally observing the witness' testimony and is not confined to a removed reading of a cold record." (Slip Op. at 15). On this basis, the Court has reversed the Court of Civil Appeals and reinstated the trial court's judgment of dismissal.

2. Respondent respectfully submits that this Court has misapprehended the decision of the Court of Civil Appeals. That Court, first of all, did *not* conclude that Ms. Capaci's conduct was not willful or contumacious. The Court of Civil Appeals agreed with the trial court that Ms. Capaci's failure to heed the trial court's warnings "warranted some form of sanction." (Ct. Civ. App. slip op. at p. 11). Such sanctions could not have been imposed in the absence of some evidence of willful or contumacious conduct. Rather, the Court of Appeals engaged in the kind of "careful scrutiny" that this Court has demanded in the review of orders of involuntary dismissal and determined that her conduct "did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not 'mandate dismissal.'" (*Id.*). The Court of Civil Appeals discussed the failure of the trial court to impose "other less drastic alternatives" to that of dismissal (*Id.*), and also made note of the

fact that the trial court had not given prior notice to Capaci that it was considering dismissal of her claims. (*Id.* at p. 9). These are precisely the factors that a reviewing court must consider, among others, in determining whether the "extreme circumstances" exist so as to justify the "harsh sanction" of involuntary dismissal.

3. Respondent respectfully submits that this Court has, by its decision, insulated Rule 41(b) orders of involuntary dismissal from any meaningful scrutiny on appellate review. The Court has essentially held that if any evidence exists to support an implied finding of contempt, that is sufficient to warrant affirmance of an involuntary dismissal as a sanction for that contempt. Respondent respectfully submits this is not the law. There is a vast difference between appellate review of a finding of contempt in proceedings not involving the dismissal of a claim, and review of an order of involuntary dismissal imposed as a sanction for such contempt. In the former, there has been no denial of the right to be heard on the merits of a claim; in the latter, that fundamental right has been denied by the involuntary dismissal of the claims as a sanction. In the former, review can most certainly be deferential; in the latter, careful scrutiny of the totality of the circumstance is required.

4. Respondent respectfully submits that if this Court is of the opinion that the Court of Civil Appeals improperly substituted its judgment for that of the trial court, in concluding that Ms. Capaci's conduct

was not contemptuous, it can and should reverse the decision on that basis and remand it to the Court of Civil Appeals for further consideration of all of the factors relevant to weighing the appropriateness of the dismissal sanction. Alternatively, this Court should engage in that analysis itself before affirming the trial court's decision.

5. Respondent respectfully submits the attached brief in support of her Application for Rehearing.

Respectfully Submitted,

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BRIEF IN SUPPORT OF APPLICATION OF REHEARING

STATEMENT OF ISSUES

1. Whether, in reviewing involuntary dismissal of an action under Rule 41(b), the appellate court must not simply defer to an implied finding by the trial court of willful or contumacious conduct but must carefully scrutinize the record to determine whether that conduct was so egregious that no lesser sanction would have availed.

2. Whether the Court of Civil Appeals engaged in a proper scrutiny of the record, applying the

appropriate factors in concluding that involuntary dismissal of this action was not justified.

SUMMARY OF ARGUMENT

This Court's opinion reverses the Court of Civil Appeals and upholds the judgment of the trial court on the basis of its conclusion that the Court of Civil Appeals substituted its judgment for that of the trial court with respect to an implied finding of willful or contumacious conduct on the part of Ms. Capaci. Respondent respectfully submits that the Court of Civil Appeals did *not* substitute its judgment for that of the trial court but rather agreed with the trial court that Ms. Capaci's conduct was sufficiently willful to justify some sanction. The Court of Civil Appeals simply concluded that the totality of the circumstances did not justify involuntary dismissal under Rule 41(b). A finding of willful or contumacious conduct on the part of Ms. Capaci does not, in and of itself, justify the involuntary dismissal of her action. The trial court, and any reviewing court, must concern itself with the extremity of that conduct, whether notice was given that dismissal might result from that conduct, whether lesser sanctions were available, and the degree to which that conduct may have interfered with the functions of the judicial process in arriving at the truth and administering justice. When those factors are considered in this case, the decision of the Court of Civil Appeals was entirely appropriate in reversing the trial court's decision dismissing the action against Ms. Capaci.

The extremely harsh sanction of involuntary dismissal must be "proportionate to the offense." *Hosey v. Lowery*, 911 So.2d 15, 18 (Ala. Civ. App. 2005). Under that principle, dismissal of Ms. Capaci's action was not warranted.

ARGUMENT

I. THE APPROPRIATENESS OF AN INVOLUNTARY DISMISSAL WITH PREJUDICE, AS A SANCTION FOR DISOBEDIENCE OF A COURT ORDER, DEPENDS UPON MORE THAN A FINDING OF WILLFUL OR CONTUMACIOUS CONDUCT

As this Court has recognized, involuntary dismissal with prejudice under Rule 41(b) "is a harsh sanction and should be used only in extreme circumstances." *Selby v. Money*, 403 So.2d 218, 220-21 (Ala. 1981). Dismissal orders must be "carefully scrutinized" and the plaintiff's conduct must "mandate dismissal". *Vesta Fire Insurance Corp. v. Milam Co. Construction, Inc.*, 901 So.2d 84, 95 (Ala. 2004) (quoting *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82, 87 (Ala. 1989)).

The propriety of an involuntary dismissal depends upon more than some evidence of willful or contumacious conduct. First of all, this Court has demanded a "clear record" of delay or contumacious conduct by the plaintiff; and a "serious showing" of willful default. *Burdeshaw v. White*, 585 So.2d 842,

848 (Ala. 1991) (quoting *Smith v. Wilcox County Board of Education*, 365 So.2d 659 (Ala. 1978)).

Secondly, this Court has held that involuntary dismissal of a plaintiff's case as a sanction is a measure of last resort. "'Where lesser sanctions are available they should be tried.'" *Atkins v. Shirley*, 561 So.2d 1075, 1077 (Ala. 1990) (quoting *Marcoal, Inc. v. United Mine Workers of America*, 292 Ala. 567, 569, 298 So.2d 6, 8 (1974)).

Another relevant factor, based on due process considerations, is whether notice had been given that dismissal of an action might occur as a result of the conduct at issue. *See Hosey v. Lowery*, 911 So.2d 15, 18 (Ala. Civ. App. 2005) (dismissal of plaintiff's claims, as sanction for failure of plaintiff's counsel to attend hearing on motions that had been rendered moot, without prior notice that dismissal of claims would be considered at the hearing, violated Plaintiff's due process rights); *Hodge v. R&R Movers*, 716 So.2d 740 (Ala. Civ. App. 1998) (dismissal of action for failure to file certificate of readiness reversed where Plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal). *See also Ex parte Andrews*, 2009 WL 1426031 (Ala.S.Ct. May 22, 2009) (quoting *Hosey v. Lowery, supra*, approvingly) and other cases cited in Capaci's Opposition Brief at p. 49.

Finally, due process considerations require some causal nexus between a party's misconduct that triggered the dismissal and some interference with

the judicial process of ascertaining the truth and administering justice between the parties. Where the misconduct of a party interferes with the production of evidence so as to justify a presumption that a party's claim or defense lacks merit, default or dismissal, as a sanction for that misconduct, is consistent with due process concerns. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370 (1909); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 705-06, 102 S.Ct. 2099 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087 (1958). On the other hand, where such a sanction is issued to punish a contempt of court that does not raise such a presumption or otherwise threaten truth-seeking functions, due process is violated. *See Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841 (1897); *Insurance Corp of Ireland, Ltd.*, 456 U.S. at 706 (due process violated "if the behavior of the defendant will not support the *Hammond Packing* presumption"); *Degen v. U.S.*, 517 U.S. 820, 828, 116 S.Ct. 1777 (1996) (citing *Hovey* approvingly for unconstitutionality of dismissal as punishment for contempt of court); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985) (due process prevents imposition of severe sanctions of dismissal or default "merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case") (quoting *Wyle v. R.G. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983)). *See generally* A. Wright & Miller, *Federal Practice and Procedure Civ. 2d* § 2283 (discussing constitutional limits on Rule 37

sanctions). These arguments are addressed in more detail in Capaci's opposition Brief at pp. 32-37.

In summary, appellate review of a judgment of involuntary dismissal, entered as a sanction for disobedience to a court order or for other misconduct, before or during trial, requires a careful consideration and weighing of a number of different factors. The Court must be convinced that a point has been reached where "the interest of the court in controlling its calendar and the risk to the defendant **outweigh** the interest in disposing of the litigation on the merits." *Burdeshaw v. White*, 585 So.2d at 847 (quoting *Selby v. Money*, 403 So.2d at 220-21) (emphasis added). Where, upon appellate review, that point had not been reached at the trial court level, a judgment of dismissal must be reversed. *See Burdeshaw v. White*, 585 So.2d at 849.

Respondent respectfully submits that this Court, in its opinion, has not engaged in the requisite weighing of the competing interests at stake and has not employed the requisite factors to be considered in determining the propriety of the dismissal. The Court has simply concluded that the Court of Civil Appeals substituted its judgment for that of the trial court in concluding that Ms. Capaci's conduct was not willful or contumacious. Respondent begs to differ that this was, in fact, the conclusion of the Court of Civil Appeals. Rather, that Court engaged in the kind of "careful scrutiny" of the trial court's actions, as historically mandated by this Court, by considering

the various factors discussed above, and weighing the competing interests.

This Court's reliance on decisions which have upheld findings of contempt, but which have not involved the severe sanction of dismissal of an action or the entry of default, suggests that the same standard of review should be employed in the present context. Again, Respondent submits that this is not the law. A finding of fact by the trial court, with respect to whether certain action has risen to a level sufficient to support a citation of contempt, is reviewed with a different degree of deference than a decision dismissing an action as a sanction for such contumacious conduct. This Court's conclusion that there was evidence to support the trial court's holding that Ms. Capaci acted "consciously, as opposed to accidentally or involuntarily," and thus "willfully", in failing to follow the trial court's repeated orders, (slip op. at p. 14), is not alone sufficient to justify the trial court's imposition of the severe sanction of dismissal. And yet the Court's opinion fails to consider anything else in its reversal of the Court of Civil Appeals' decision and the reinstatement of the judgment of dismissal. More is required to justify such an involuntary dismissal, both by the Constitution and this Court's own precedents.

II. THE TRIAL COURT'S INVOLUNTARY DISMISSAL IN THIS ACTION WAS AN ABUSE OF DISCRETION WHEN ALL APPROPRIATE FACTORS ARE CONSIDERED

Respondent, in her brief, set forth the factors that should be applied in assessing the propriety of an involuntary dismissal and demonstrated that, in this action, consideration of those factors should lead to the conclusion that the trial court abused its discretion and/or violated due process in dismissing this action.

First of all, as the Court of Civil Appeals recognized, Ms. Capaci's conduct, although it may have merited some form of sanction, was not egregious This is not a case involving a witness' defiance of the Court's authority, insults directed to the Court or to the other parties, or other conduct casting any aspersions upon the Court's authority. Nor does it involve conduct involving the withholding of evidence such that an inference could be drawn that Capaci's claims lacked merit. Ms. Capaci was simply a nervous witness who said too much on too many occasions after being admonished not to do so by the Court. Although the trial judge may have been in a better position than a reviewing court to assess the actual attitude of the witness, that does not eliminate the necessity for a reviewing court to review the record and, applying whatever deference is appropriate, independently assessing the egregiousness of the conduct from that record.

Secondly, as argued in Respondent's Opposition Brief, and as discussed in the opinion of the Court of Civil Appeals, there were lesser sanctions that were available and which were not tried by the Court. These included "ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt." (Ct. Civ. App. slip op. at p. 11). *See also* Capaci's Opposition Brief at pp. [illegible]-59.

Thirdly, as the Court of Civil Appeals recognized, Ms. Capaci received no warning from the trial court that it would dismiss her action with prejudice as a result of her continuing failure to confine her testimony to the questions asked. He only warned her that he would "terminate" her testimony (R. 506) and that he would "end the trial." (R. 599).

In summary, the Court of Civil Appeals engaged in an appropriate and careful scrutiny of the totality of circumstances surrounding the involuntary dismissal of Ms. Capaci's action. It concluded, appropriately, that the trial court had abused its discretion under the circumstances.

CONCLUSION

For all of the above reasons, Respondent respectfully requests that this Court grant her application for rehearing and, upon reconsideration of its opinion, either affirm the decision of the Court of

Civil Appeals or remand the decision to that Court for further consideration in light of this Court's opinion.

Respectfully Submitted,

/s/ William W. Watts

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2009, I electronically filed the foregoing with the Clerk of Court using the AlaFile system which will send notification of such filing to the following:

George M. Walker, Esq.
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P.O. Box 123
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and by by United States Mail, first-class postage prepaid to the following:

Honorable Robert G. Esdale, Sr.
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s/s William W. Watts, III

IN THE ALABAMA COURT OF CIVIL APPEALS
CASE NO. 2060846

ANDRA CAPACI d/b/a
ANDRA CAPACI REAL ESTATE

Appellant

v.

FOLMAR KENNER, LLC

Appellee

On Appeal from the Circuit Court of
Mobile County, Alabama
Civil Action No. 04-2311

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was commenced by counterclaim defendant-appellee Folmar Kenner, LLC ("Folmar") against counterclaimant-appellant Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") for breach of a shopping center lease. (C.1) Capaci counterclaimed for breach of the covenant of quiet enjoyment and constructive eviction. (C.24). In particular, Capaci alleged breach of contract, negligence and willfulness in the failure of the landlord Folmar to properly construct and maintain the premises, resulting in the growth and proliferation of toxic mold, causing her bodily injury and property damage and forcing her to vacate the premises and to incur extra expenses and costs in doing so. (C.26-29).

The claims of Folmar against Capaci were ultimately settled before trial by Capaci's liability insurer. (C971). Trial on Capaci's counterclaims commenced on February 26, 2007. (C.1649). Near the close of the fourth day of trial, Ms. Capaci was testifying on the stand. After several warnings to keep her answers responsive to the questions, the court terminated her testimony, terminated the trial, and sua sponte dismissed Capaci's counterclaims with prejudice. (R.644; C.1507).

An order dismissing the counterclaims and entering judgment for Folmar was entered on March 21, 2007. (C.1507). Costs were taxed against Capaci. (*Id.*) A motion for new trial or to alter or amend the judgment was filed on April 17, 2007 (C.1511), and

was denied on April 25, 2007. (C.1617). A timely notice of appeal was thereafter filed on May 2, 2007. (C.1618).

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE THE APPELLANT'S ACTION WITH PREJUDICE DUE TO APPELLANT'S FAILURE TO CONFINE HER TESTIMONY TO THE QUESTIONS ASKED OF HER, WHERE APPELLANT WAS NOT GUILTY OF ANY WILLFULNESS OR CONTUMACIOUS CONDUCT IN DOING SO.

2. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE APPELLANT'S ACTION WITH PREJUDICE, WITHOUT WARNING THAT IT WOULD DO SO, AND WHERE LESSER SANCTIONS WERE AVAILABLE TO DO JUSTICE BETWEEN THE PARTIES.

3. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER AN AWARD OF COSTS PURSUANT TO RULE 68, *A.R.C.P.* WAS PROPER WHERE APPELLANT CAPACI RECOVERED NO JUDGMENT AGAINST APPELLEE FOLMAR.

4. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER THE AWARD OF COSTS MUST BE REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS BECAUSE IT CANNOT BE DETERMINED WHETHER THAT AWARD WAS

PROPERLY BASED UPON THE COURT'S DISCRETIONARY AUTHORITY UNDER RULE 54(d) OR IMPROPERLY BASED UPON THE MANDATORY PROVISIONS OF RULE 68, *A.R.C.P.*

5. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER THE AWARD OF CERTAIN EXPENSES AS COSTS WERE BEYOND THE POWER OF THE TRIAL COURT UNDER RULE 54(d) OR RULE 68.

STATEMENT OF THE FACTS

Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") leased office space from defendant Folmar Kenner, LLP ("Folmar") in a shopping center in Kenner, Louisiana. Capaci experienced problems with water intrusion into the premises over the years. In May of 2004, Capaci observed mold growth in her office space and wrote a letter to Folmar complaining about it. Two days later, when a bathroom ceiling tile collapsed, she wrote a letter to Folmar and vacated the premises. Subsequent inspections verified the presence of significant mold growth and the office space required professional remediation. Capaci never returned to the premises. Capaci's office property was removed by Folmar and stored in a trailer. *See* Folmar's Trial Brief (C.14-29). The parties dispute the cause of the mold growth and who was responsible for it. The parties further dispute whether the premises were properly remediated, or made safe for reoccupancy, as well as the nature and extent of any loss to Capaci's personal property and

other alleged bodily injuries and income losses due to the interruption of her business.

The claims of Folmar against Capaci for breach of the lease were settled before trial by Capaci's insurance company. (C.971). Trial commenced on Capaci's counterclaims against Folmar for breach of the lease and for negligence and wantonness in the construction and maintenance of the premises. After four days of trial, near the conclusion of her case, Andra Capaci was called to the stand as a witness. (R.498)

After first confessing her nervousness on the stand (R.498), Ms. Capaci began answering questions about problems with water intrusion into the premises and her complaints about those leaks. During argument of counsel, Capaci volunteered a response. (R.506). At that point, the trial court warned her about volunteering information:

> The witness: *It was under duress.*
>
> The court: *Ms. Capaci.*
>
> The witness: *Yes?*
>
> The court: I *am going to warn you right now,* –
>
> The witness: *Yes.*

> The court: – *If you volunteer any information, I am going to terminate your testimony just like Dr. Lipsey's. Do you understand me?*[1]
>
> The witness: *Yes.*
>
> The court: *Listen to what this gentleman asks you, respond to the question.*
>
> The witness: *Yes. I am sorry, Your Honor. I am a little nervous.*
>
> The court: *I understand.*

(R.506-07)

As Ms. Capaci continued to testify, her answers at times continued to exceed the scope of the question or were otherwise non-responsive. (R.514-16, 525). The court would remind her of the question that was asked and instruct her to listen carefully to the question (R.516, 525-26). Objections on the grounds of hearsay were also sustained when she began to testify about what other people had said (R. 509, 513, 526, 530, 532).

At page 531, after she had begun to testify beyond the scope of the question, the court again sustained an objection and warned her about volunteering information. (R.531-32). She agreed to do so, admitting her nervousness. (R.532). At page 550, an

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[1] The court had earlier terminated and stricken the testimony of plaintiff's expert, Dr. Lipsey, and instructed the jury to disregard it. (R.194-95).

objection was again sustained to an answer on the grounds that it exceeded the scope of the question. (R.550-51).

The cross-examination of Ms. Capaci begins at R.562. When she began to explain about something that had not been asked of her, the court told her that her own counsel could have her explain if need be, but that she should try to answer the questions. (R.564). She again apologized to the court, saying she was "nervous." (R.564). She also apologized to Folmar's counsel saying that she did not mean to disturb him. (R.564). Later, when she began to, testify before Folmar's counsel had finished his question, she again apologized, explaining that she was just nervous. (R.569-70).

As the cross-examination continued, the court reminded her on several occasions to answer the question, when she failed to do so. (R.580, 584, 585, 593).

At page 598, after she began testifying beyond the scope of the question, the court interrupted:

> The court: *Ms. Capaci.*
>
> The witness: *I'm sorry. I am just –*
>
> The court: *Ms Capaci, I am going to tell you one last time and this is absolutely your last warning. This trial will end the next time you volunteer an answer that is not requested for by the question. Do you understand that?*

The witness: *I will try to pay closer attention,*

The court: *No. Do you – okay, thank you.*

The witness: *I will try very hard to pay closer attention. If I am slow with my answers, it's because I'm thinking, okay?*

The court: *Being slow has not been the problem, Ms. Capaci.*

The witness: *Okay, I'm going to be slow.*

The court: *Listen to the question, please.*

The witness: *I'm going to be slow and think before I talk.*

(R.598-99).

At page 600, she was questioned:

Q: *You didn't hire anybody to move them?*

A: *I couldn't afford to, no.*

Q. *You didn't tell anybody to do it?*

A. *I couldn't afford to, no.*

The court: *Ms. Capaci*

The witness: *I said it wrong again. Oh, god, I am sorry. Jesus God, I am sorry.*

(R.600).

Later, Folmar's counsel began questioning the witness about certain tax returns prepared by a tax preparer for the years 2003 and 2004. (R.628-642;

Folmar Exs. 114, 138, 139). Counsel began asking her about the cost of certain office inventory listed on the schedules:

> Q: *In this return to the IRS, you represented the office sofa cost* $1304.00 *and that you got it on December 7, 2001, correct?*
>
> A. *Well, can I ask you – these are from 1999, 1999 figures here, 7/1999?*
>
> Q. *I am not arguing with you about it. I just want you to confirm that that's the representation that you made to the IRS.*
>
> A. *I don't understand it; I will be honest.*
>
> Q. *You don't have to understand it. I just want you to agree with me that this is the figure that is on your return to the IRS?*
>
> A. *I don't know.*
>
> Q. *You don't know. You can't see it there?*
>
> A. *I cross my heart and hope to die, I don't know. It says, 2004. I don't know where this came from. I don't know where Shep [tax preparer] got this. I didn't give it to him.*
>
> Q. *No, ma'am. I hadn't asked you any of that. I just want to know –*

(R.642-43).

At this point, the court stopped the cross-examination, dismissed the jury and then spoke to the lawyers and parties:

> The court: *I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs taxed to the plaintiff on this matter.*

(R.644).

An order was thereafter entered, dismissing the action with prejudice and taxing costs against Capaci. (C.1507). Costs were taxed against Capaci pursuant to a motion to tax costs, filed by Folmar, seeking some $25,503.78 (C.1448), which motion was granted the day after it was filed. (C.1506). The motion sought costs pursuant to Rule 54(d) and Rule 68, *A.R.C.P.* (C.1448). Capaci filed a Rule 59 motion to alter or amend the judgment, contending that Rule 68 was inapplicable (R.1511). This motion was denied. (C.1617).

STATEMENT OF THE STANDARD OF REVIEW

Dismissal for failure to comply with a court order under Rule 41(b), *Ala. R. Civ. P.,* is reviewed for abuse of discretion. *Jones v. Merrill Lynch Pierce Finner & Smith, Inc.,* 604 So.2d 332, 341 (Ala. 1991).

Review of an order taxing costs is reviewed for abuse of discretion. *Bundrick v. McAllister,* 882 So.2d 864, 866 (Ala. Civ. App. 2003).

SUMMARY OF ARGUMENT

An involuntary dismissal with prejudice under Rule 41(b), *A.R.C.P.,* for failure to comply with a court order, is a harsh sanction to be used only in extreme circumstances. Such a dismissal should be granted only where there is a clear record of delay, willful default or contumacious conduct by the plaintiff. Lesser sanctions, if available, should be adopted. The power of the court to dismiss an action under Rule 41(b) is circumscribed by the constitutional right to due process,

The Appellant Andra Capaci was guilty of no such willfulness or contumacious conduct in this action. On the witness stand, she answered the questions to the best of her ability but often was unable to confine her answers to the questions posed. Her inability to do so was not willful and did not warrant the sanction of dismissal. Lesser sanctions were available, such as a mistrial, the striking of any testimony that was non-responsive, or citation for contempt. The dismissal of Capaci's claims under these circumstances violated her due process rights and/or was otherwise an abuse of discretion and must be reversed.

Were this Court to sustain the dismissal of the action with prejudice, the award of costs against Capaci cannot be sustained. Folmar filed a motion to tax costs relying upon both Rule 54(d) and Rule 68, *A.R.C.P.* Rule 66 was not available as a basis for the award of costs because Folmar was a victorious

defendant and a judgment was not obtained by Capaci in an amount less than the sum offered. The trial court awarded all costs sought by *Folmar* one day after the filing of the motion. The basis for the award of costs cannot be determined. If the court awarded costs on the basis of Rule 68, which mandates the award of all recoverable costs, the court erred. The award of costs must therefore be reversed and remanded to the trial court with instructions to exercise its discretion under Rule 54(d) alone.

Moreover, certain of the expenses awarded to Folmar are not recoverable under Alabama law as costs. These expenses must be eliminated from any award of costs that the trial court may grant upon remand.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE PLAINTIFF'S ACTION WITH PREJUDICE WHERE THE RECORD REFLECTS NO WILLFUL DEFAULT OR CONTUMACIOUS CONDUCT ON HER PART IN HER EFFORT TO ANSWER QUESTIONS ON THE WITNESS STAND.

Rule 41(b), *Ala. R. Civ. P.*, provides for the involuntary dismissal of an action upon "failure of the plaintiff to prosecute or to comply with these rules [of civil procedure] or any order of court." Involuntary

dismissal with prejudice under Rule 41(b) "is a harsh sanction and should be used only in extreme circumstances." *Smith v. Savage,* 655 So.2d 1022, 1024 (Ala. Civ. App. 1995) (quoting *Selby v. Money,* 403 So.2d 218, 220-21 (Ala. 1991)).Such a dismissal may be granted only "when there is a clear record of delay, willful default or contumacious conduct by the plaintiff." *Id.* (quoting *Selby v. Money, supra*); *see Ryder International Corp. v. State of Alabama*, 439 So.2d 162, 164 (Ala. Civ. App. 1983) (dismissal with prejudice, as sanction for failure to comply with court rule, is "drastic and should be ordered only in extreme situations involving willful or contumacious conduct."). "Where lesser sanctions are available, they should be tried." *Atkins v. Shirley,* 561 So.2d 1075, 1077 (Ala, 1990) (quoting *Marcoal, Inc. v. United Mine Workers of America,* 292 Ala. 567, 298 So.2d 6, 8 (1974)).

The power to involuntarily dismiss an action, with prejudice, under Rule 41(b), is circumscribed by the constitutional guarantee of due process. In *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087 (1958), the U.S. Supreme Court held that dismissal of an action with prejudice, for failure of the plaintiff to comply with a pretrial production order, where that production would have violated Swiss penal laws, was not justified because the failure to comply was not due to any willfulness, bad faith or fault on the part of the plaintiff. 78 S. Ct. at 1096. The district court had dismissed the action under Rule 37(b)(2),

F.R.C.P., relating to the consequences of disobedience of an order as to discovery. *Id.* at 1093. The Court held that the provisions of Rule 37 had to be read in light of the Due Process clause of the Fifth Amendment. *Id.* at 1094. Citing to its own prior decisions in *Hovey v. Elliott,* 167 U.S. 409, 17 S. Ct. 841. (1897) and *Hammond Packing Co. v. State of Arkansas,* 212 U.S. 322, 29 S. Ct. 370 (1909), the Court observed that "there are constitutional limits upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*

The Alabama Supreme Court has explicitly recognized these constitutional restrictions on the exercise of the power of dismissal under Rule 37. *See Wetherly v. Baptist Medical Center,* 392 So.2d 832, 836 (Ala. 1981) (recognizing "constitutional limitations" on Rule 37, as set out in *Societe Internationale,* and recognizing "willfulness" of plaintiff's conduct as "key criterion" to imposition of drastic sanction of dismissal under Rule 37).

Although the *Societe Internationale* decision involved the power of dismissal under Rule 37, the same constitutional restrictions circumscribe the powers of dismissal under Rule 41(b). *See Societe Internationale*, 357 U.S. at 208, 78 S. Ct. at 1093 (noting that Rule 41 "cannot easily be interpreted to afford a court more expansive powers than does Rule 37"). In *McCollum v. Birmingham Post Co.,* 259 Ala. 88, 65 So.2d 689 (1953), the Alabama Supreme Court

recognized the constitutional limitations upon the court's inherent power to dismiss an action for disobedience of a court order. The Court held that the dismissal of a libel suit, due to the plaintiff's failure to submit to a perpetuation of his testimony in collateral proceedings, was void as a denial of due process of law under the Alabama and U. S. Constitutions, where there had been no default by the plaintiff in the prosecution of his action. 65 So.2d at 695. Relying upon *Hovey v. Elliott* as the "leading case," the Court observed.

> "Courts have no inherent power to punish contempt by denying a hearing to the contemnor, in striking his pleadings or entering default judgment or dismissal against him, since one of the fundamental conceptions governing the court of justice is condemnation only after a hearing, and an order of this nature denying the condemnor a right, as distinguished from a favor, is void for want of due process of law in violation of the Fourteenth Amendment to the Federal Constitution or a comparable provision of the applicable state Constitution."

65 So.2d at 694 (quoting *Annot.*, 14 A.L.R. 2d 589, § 5).

Cases from the old Fifth Circuit have also held that dismissal under the comparable federal Rule 41(b), *F.R.C.P.* can only be justified where there is "a clear record of delay or contumacious conduct by the plaintiff," *Durham v. Florida East Coast Railway Co.*,

385 F.2d 366, 368 (5th Cir. 1967), and where "lesser sanctions would not serve the best interest of justice." *Pond v. Brannif Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972) (lesser sanctions will normally suffice, except in the most "flagrant circumstances"); *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 888 (5th Cir. 1968), *cert. denied,* 392 U.S. 928, 88 S. Ct. 2287 (1969) (dismissal of action with prejudice is drastic remedy to be used only in extreme situations, "as the court has a wide range of lesser sanctions"). The holdings of these cases have been expressly adopted by the Alabama Supreme Court. *See Smith v. Wilcox County Board of Education,* 365 So.2d 659, 661 (Ala. 1978) (citing *Durham, Pond* and *Flaksa*).

Consistent with the above principles, the appellate courts in this state have consistently reversed dismissals of actions with prejudice under Rule 41(b) in the absence of a clear record of willful default or contumacious conduct on the part of the plaintiff in the prosecution of the case or failure to obey a court order. *See Atkins v. Shirley,* 561 So.2d 1075 (Ala. 1990) (dismissal for want of prosecution for failure to appear at pretrial docket was abuse of discretion); *Riddlesprigger v. Ervin,* 519 So.2d 486 (Ala. 1987) (dismissal for want of prosecution of case pending for six months was improper where plaintiff's conduct was not dilatory or contumacious); *Wetherly v. Baptist Medical Center,* 392 So.2d 832 (Ala. 1981) (trial court abused its discretion in imposing sanction of dismissal for plaintiff's failure to comply with order to

answer interrogatories where he was physically and mentally unable to answer them); *Smith v. Wilcox County Board of Education,* 365 So.2d 659 (Ala. 1978) (dismissal for want of prosecution, after several years of inactivity, was abuse of discretion where record did not reflect plaintiff was deliberately proceeding dilatorily); *Smith v. Savage,* 655 So.2d 1022 (Ala. Civ. App. 1995) (reversing dismissal of action for want of prosecution based on pro se plaintiff's failure to appear at trial due to flat tire); *Ryder International Corp. v. State,* 439 So.2d 162 (Ala. Civ. App. 1983) (trial court abused its discretion in dismissing taxpayer's appeal with prejudice because of failure to comply with local court rule requiring filing of complaint setting forth issues presented for review where error was accidental).

The trial court's dismissal with prejudice of the claims of Ms. Capaci, sua sponte, cannot be sustained under the foregoing principles. The record fails to establish any "willful default" or "contumacious conduct" on the part of Ms. Capaci. She did not, at any time, willfully or intentionally refuse to answer any question posed to her. Her failure to comply with the court's repeated admonitions to answer the question was not willful. From the record, it is apparent that her self-confessed anxiety repeatedly interfered with her ability to listen to the questions and respond succinctly.

Lesser sanctions were available. The trial court could have simply struck, and continued to strike, testimony that was non-responsive. It could have held

the witness in contempt of court. Finally, it could have granted a mistrial. The extreme measure of dismissal with prejudice was not necessary in order to do justice in this case.

The court's dismissal of the case with prejudice also came without warning that such a consequence might follow from Ms. Capaci's non-responsive answers. The court warned her that he would "terminate her testimony" if she continued to volunteer information. (R.506). He warned her that the "trial will end the next time you volunteer an answer that is not requested for by the question." (R.596). He did not warn her or her counsel that he would sua sponte dismiss the action with prejudice. Such lack of notice is a relevant factor in assessing the propriety of the court's discretion in dismissing the action. *See Hodge v. R&R Movers,* 716 So.2d 740 (Ala. Civ. App. 1998) (dismissal of action for failure to file certificate of readiness where plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal).

In summary, the action of the trial court, in sua sponte dismissing the action with prejudice, violated the Due Process rights of Ms. Capaci to a hearing on the merits of her claims and/or was otherwise an abuse of discretion of the trial court's power under Rule 41(b).

II. IF THE JUDGMENT IS AFFIRMED, THE TRIAL COURT' S AWARD OF COSTS MUST BE REVERSED AND THE CAUSE REMANDED WITH INSTRUCTIONS TO AWARD COSTS PURSUANT TO THE COURT'S DISCRETION UNDER RULE 54(d) AND NOT PURSUANT TO RULE 68

In the event this Court were to affirm the action of the trial court in dismissing the action with prejudice, the costs awarded to Folmar in this action cannot be sustained. In its post-trial motion to tax costs, Folmar sought, and, the day after motion was filed, was granted some $25,503.78 in costs. (C.1448, 1506). Folmar relied upon Rule 54(d), *A.R.C.P.*, as the prevailing party, as well as Rule 68, *A.R.C.P.* on the basis of an offer of judgment made on July 26, 2006. (C.1448-50). As argued below, Rule 68 provides no authority for the award of costs in this case. Because the award of *all* recoverable costs is *mandatory* under Rule 68, rather than *discretionary* with the trial court, as it is under Rule 54(d), and because the trial court's order fails to reflect whether the award of costs was made pursuant to Rule 54(d) or Rule 68, it is impossible to know whether the court exercised its discretion in the award of costs under Rule 54(d) or determined such costs were mandatory under Rule 68. A remand is therefore necessary for the court to properly exercise its discretion under Rule 54(d).

A. Rule 68 Does Not Provide A Basis For An Award Of Costs Where The Plaintiff-Offeree Loses The Case And Obtains No Judgment Against the Defendant-Offeror.

Rule 68, *A.R.C.P.*, provides a basis for an award of costs only when "the judgment finally obtained by the offeree is not more favorable than the offer." The Alabama Supreme Court has construed this language to mean that the offeree must obtain a judgment for an amount less favorable than the offering party's settlement offer. If, instead, the plaintiff-offeree loses the case entirely and does not obtain a judgment against the defendant-offeror, Rule 68 provides no basis for an award of costs. *Ex Parte Waterjet Systems, Inc.*, 758 So.2d 505, 508-09 (Ala. 1999). In the words of the Supreme Court, "the plain language of Rule 68 states that a final judgment in the plaintiff-offeree's favor for an amount less than the amount of the offer is a prerequisite to the plaintiff-offeree's liability for costs." *Id.* at 508; *Accord Judd v. Sandefer*, 852 So.2d 164, 165 (Ala. Civ. App. 2002) ("Waterjet does not permit the recovery of costs by a victorious defendant.").

Capaci did not obtain a judgment against Folmar in an amount less than the Rule 68 offer. Rather, Folmar prevailed and obtained a dismissal of the action with prejudice. Therefore, costs may not be taxed against Capaci on the basis of Rule 68.

B. The Award Of Costs Must Be Reversed And Remanded For Further Proceedings For Reconsideration By The Trial Court On The Basis Of Rule 54(d) Alone.

Under Rule 68, if the offeree of an offer of judgment rejects the offer, but later obtains a judgment that "is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." (emphasis added). The language of the rule is mandatory. *Adkinson v. Long*, 559 So.2d 55, 58 (Ala. Civ. App. 1990). Rule 68 "limits the customary discretion afforded to the trial court with respect to cost allocation when an offer of judgment has been rejected." *Ennis v. Kittle*, 770 So.2d 1090, 1092 (Ala. Civ. App. 1999). *See Honeycutt ex rel. Martin v. Sherman*, 806 So.2d 401 (Ala. Civ. App. 2001) (holding that, under Rule 68, plaintiff was entitled to recover all properly taxable costs that had accrued).

In contrast, under Rule 54(d), costs are to be allowed to the prevailing party "unless the court otherwise directs." Thus, the trial court retains authority to use its discretion to deny costs or to allocate costs differently. *Ennis v. Kittle*, 770 So.2d 1090, 1091 (Ala. Civ. App. 1999).

In the present case, the trial court, one day after Folmar's motion was filed, entered a one sentence order granting the motion. (C.1506). From the record, it cannot be determined on what basis the trial court awarded the costs. If it followed the mandatory

provisions of Rule 68 in awarding costs, it erred. The award of costs must be reversed and the cause remanded to the trial court to review the motion to tax costs under the appropriate discretionary standards of Rule 54(d).

III. CERTAIN COST ITEMS AWARDED TO FOLMAR WERE BEYOND THE TRIAL COURT'S DISCRETION UNDER RULE 54(D) AND MUST BE EXCLUDED

A. Expert Witness Fees

The fees paid by a litigant to compensate expert witnesses is not recoverable as costs under Alabama law. *Bundrick v. McAllister,* 882 So.2d 864, 867-68 (Ala. 2003).

Folmar's motion to tax costs included the following items representing payment of compensation to experts:

Date	Description	Amount
6/14/06	Deposition fee to Driskell Environmental Consultants for Capaci's expert Brent J. Driskell	$ 625.00
7/15/06	Deposition fee to Capaci's expert, David C. Flettrich, for deposition	$1,463.33
9/20/06	Consultant fee for expert Dr. Hung Cheung to oppose Capaci's expert, Dr. Shoemaker	$ 492.50

9/25/06	Expert witness fees for consultation with Roy Acord at Service Master[2]	$ 75.00
12/4/06	Investigation services by Cook's Claim Services, Inc.	$ 124.80
2/28/07	Witness fee payments to Roy Acord and ServPro	$ 1,700.00
3/7/07	Witness fee payment to Cook's Claim Service, Inc.[3]	$ 2,295.18
		$ 6, 775.81

(C.1458-61). These costs were improperly awarded.

B. Private Investigator Expenses for Service of Subpoenas

Alabama law does not support the taxing of payment of expenses incurred by private investigators undertaking the service of various subpoenas. *Bundrick v. McAllister,* 882 So.2d at 868.

A number of items on Folmar's cost bill included expenses for service of subpoenas by a private process server, including the following:

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[2] Roy Acord was identified as Folmar's expert at C.412.

[3] Richard Gardner of Cook's Claims Service was identified as Folmar's expert at C.371.

Date	Description	Amount
3/7/05	Service of non-party subpoena on Dr. Dennis Occhipinti	$ 40.00
3/7/05	Service of non-party subpoena on American National Property and Casualty Insurance Company	$ 55.00
4/11/05	Service of non-party subpoenas on Ronald Updegraff, BC/BS of Lousiana and Louisiana Department of Insurance	$ 120.00
4/11/05	Service of non-party subpoenas on Dr. Shamsnia and Dr. Rovena	$ 115.00
5/16/05	Service of non-party subpoena on Louisiana Real Estate Commission in Baton Rouge	$ 50.00
5/20/05	Service of non-party subpoena on Slidell Memorial Hospital	$ 75.00
5/30/06	Service of subpoenas to Greater New Orleans Home Service and IHLAB	$ 80.00
6/20/06	Additional fee for service on IHLAB and Greater New Orleans	$ 75.00
1/18/07	Service of four subpoenas in Metairic, Harahan and New Orleans, Louisiana	$ 200.00
		$ 810.00

(C.1456-61). These costs were improperly awarded.

C. Online Research

Folmar's cost bill includes expenses for "online research," totaling some $1,531.63. (C.1456-61). There is no authority under Alabama law for the recovery of such expenses in an award of costs.

D. Mediation Fees

Folmar's cost bill includes mediation fees as follows:

Date	Description	Amount
9/9/05	Mediation fees	$ 447.22
12/6/06	Mediation fees	$ 567.48
		$ 1,014.70

(C.1457, 1460). There is no authority under Alabama law for the taxation of such fees under Rule 54(d).

E. Summary

In summary, in the event this Court affirms the judgment of dismissal below, certain costs must be eliminated as a matter of law because they are not taxable as costs under Alabama law. These costs total $10,132.14.

CONCLUSION

For all of the above reasons, Appellant Andra Capaci respectfully submits that the order of dismissal with prejudice, entered sua sponte against her

on her counterclaims, should be reversed and the matter remanded to the trial court for a new trial. Alternatively, the award of costs against her should be reversed and remanded for further proceedings for the recovery of costs under Rule 54(d), *A.R.C.P.* alone. Certain costs awarded must also be eliminated as a matter of law.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11th day of October, 2007, served a copy of the foregoing on counsel for all parties to this proceeding, by depositing same in the United States mail, properly addressed and first class postage prepaid:

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